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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAY 2 0 2010

LIN 07 032 53320

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an automotive retail company. It seeks to employ the beneficiary permanently in the United States as a storage and distribution manager. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Permanent Employment Certification, certified by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's February 11, 2008 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on June 14, 2006, and the proffered wage as stated on the Form ETA 9089 is $33.25 per hour for 40 hours per week which equates to $69,160 per year. The Form ETA 9089 states that the position requires two years experience in the proffered position.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] Relevant evidence in the record includes a brief from counsel; a letter from the petitioner; the petitioner's 2006 IRS Form 1120S, U.S. Income Tax Return for an S Corporation; financial statements for 2003 and 2004; and, 2006 and 2007 IRS Forms W-2, Wage and Tax Statements, issued by the petitioner to a prior employee.

The petitioner's financial statements for 2003 and 2004 are compilation reports. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. An audit is conducted in accordance with generally accepted auditing standards to obtain a reasonable assurance that the financial statements of the business are free of material misstatements. The unaudited financial statements that counsel submitted with the petition are not persuasive evidence. The accountant's report that accompanied those financial statements makes clear that they were produced pursuant to a compilation rather than an audit. As the accountant's report also makes clear, financial statements produced pursuant to a compilation are the representations of management compiled into standard form. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1986 and to employ 2 workers. According to Form ETA 9089, the beneficiary has not been employed by the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during the requisite period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. There is no evidence in the record of proceeding to establish that the petitioner ever paid the beneficiary.

If, as in this case, the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during the requisite period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income.

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts, 558 F.3d at 116. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang,* 719 F.Supp. at 537 (emphasis added).

The petitioner's tax return demonstrates its net income for 2006 as $28,884.[2] Therefore, the petitioner has not established that is has sufficient net income in 2006 to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[3] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

The petitioner's tax returns demonstrate its net current assets (liabilities) for 2006 as -$31,639. Therefore, the petitioner did not have sufficient net current assets in 2006 to pay the beneficiary the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the

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[2] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 23 (2001-2003) and line 17e (2004-2005) of Schedule K. *See* Instructions for Form 1120S, 2006, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed August 26, 2009) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.).

[3] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

On appeal, counsel submits a brief asserting that the petitioner has conducted business without interruption since 1986; that in 2006, the petitioner paid another employee whose salary was to be considered in the hiring of the beneficiary; and that the petitioner had assets in 2006 which could be considered to pay an employee's salary. On appeal counsel also submits a letter from the petitioner stating that in 2006, the company believed it would have the ability to pay an employee (the beneficiary) a full-time salary at the prevailing wage because it had had steady business for 20 years and had "accessed [sic] its financial situation." The petitioner explains that one of its employees, [redacted], was not expected to be permanent and had worked for the petitioner from 2006 until August 2007. The documentation submitted on appeal reflects that [redacted] received a salary totaling $42,900 in 2006 and $28,884 for part of the year in 2007. The petitioner states that with cash-on-hand, it could meet the prevailing wage to pay the beneficiary because they would be dismissing [redacted] so that the beneficiary could be employed.

In general, wages already paid to others are not available to prove the ability to pay the wage proffered to the beneficiary at the priority date of the petition and continuing to the present. Moreover, there is no evidence in the record of proceeding to establish that [redacted] duties as performed are the same as those of the proffered position as set forth on the ETA 750. The petitioner has not documented the position, duty, and termination of [redacted] and if he performed other kinds of work, then the beneficiary could not replace him.[4]
On appeal, the petitioner also states that in 2006, its cash, assets, and shareholder's equity increased while its fixed obligations such as loans and mortgages decreased. However, no evidence to support these assertions is contained in the record. Going on record without supporting documentary

[4] The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

It is noted that because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Furthermore, the petitioner's 2006 cash, assets, and fixed obligations such as loans and mortgages were items already accounted for in the evaluation of its net income and net current assets.

In this case, the petitioner has not established an ability to pay the beneficiary the proffered wage through net income or net current assets. The petitioner also has not established its historical growth, the occurrence of any uncharacteristic business expenditures or losses, or its reputation within its industry. Therefore, the AAO concludes that the petitioner has not demonstrated adequate financial strength through its net current income, net current assets, or any other means to demonstrate its ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

Beyond the decision of the director, there are discrepancies noted in the record regarding the beneficiary's qualifications to perform the duties of the proffered position.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). As previously stated, the labor certification application was accepted on June 14, 2006.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also*, *Mandany v. Smith*, 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have 24 months experience as a storage and distribution manager.

The regulation at 8 C.F.R. § 204.5(l)(3) provides that any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers

giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

On the Form 9089, the beneficiary indicated that he had been employed as a warehouse manager by in Georgetown Guyana, from January 1, 1992 to September 30, 1994, and by in Rockville Center, New York, from January 1, 1998 until June 14, 2006. The ETA Form 9089 is accompanied by a letter from owner of (with various addresses), stating that the beneficiary was employed with the company as a warehouse manager on a full-time basis, 40 hours per week basis, from January 1998 through February 2001 at a salary of $500.00 per week.

A prior petition contained in the record of proceeding filed on behalf of the beneficiary by ., in Rockville Center, New York, was denied by the Director, Vermont Service Center, on January 7, 2004, because the petitioner in that case had failed to establish the beneficiary's work experience as a distribution warehouse manager. An appeal from that decision was dismissed by the AAO on July 13, 2005. In its dismissal, the AAO noted that the documentation submitted with regard to the beneficiary's employment with the petitioner did not clearly establish whether the beneficiary worked part-time or full-time in 1999 and 2000, and whether the time worked by the beneficiary from 1999 to 2001 would constitute two years of relevant work experience. The beneficiary's IRS Forms 1040 indicated that the beneficiary worked for the petitioner as a "dispatcher," and his IRS Forms W-2 indicated he was paid $16,949.96 in 1999, $16,575 in 2000, and $28,485 in 2001.

The discrepancies in the record have not been resolved in the current case. Without more persuasive evidence, such as payroll records that indicate the actual work status of the beneficiary during his claimed years of employment, and other documentation as to the actual duties of the beneficiary during the claimed years of employment with the documentation in the record is not sufficient to establish that the beneficiary has the requisite two years of previous work experience as a storage and distribution manager. Doubt cast on any aspect of the evidence as submitted may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the application. Further, it is incumbent on the applicant to resolve any inconsistencies in the record by independent objective evidence; any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582. (Comm. 1988).

The AAO concludes that the preponderance of the evidence does not demonstrate that the beneficiary has the required 24 months experience as a storage and distribution manager. Therefore, the record of proceeding does not contain evidence reflecting the beneficiary has the required experience conforming to the regulatory requirements of 8 C.F.R. § 204.5(l)(3)(ii)(A), and is another reason why the petition may not be approved.

In *Matter of Estime*, the BIA made two conclusions: (a) "[a] determination of statutory ineligibility is not valid unless based on evidence contained in the record of proceedings" (*Matter of Estime*, 19

I&N 450, 451-452 (BIA 1987)); and (b) the review on appeal is limited to the record of proceeding before the director. *Id. See also* 8 C.F.R. § 103.8(d):

> The term *record of proceeding* is the official history of any hearing, examination, or proceeding before [USCIS], and in addition to the application, petition or other initiating document, includes the transcript of hearing or interview, exhibits, and any other evidence relied upon in the adjudication; papers filed in connection with the proceedings, including motions and briefs; the [USCIS] officer's determination; notice of appeal or certification; the Board or other appellate determination; motions to reconsider or reopen; and documents submitted in support of appeals, certifications, or motions.

USCIS administrative procedure requires the creation of a permanent A-file to house the appellate record of any denied *immigrant* visa petition. USCIS Adj. Field Manual 22.2(l)(2) ("If the grounds of denial have not been overcome, an A-file is created to house the record of proceeding and the case must be forwarded to the AAO in accordance with 8 CFR 103.3."). If an A-file already exists for that alien, the denied petition is consolidated into the existing A-file. The system is designed to consolidate the denials common to an alien into his or her permanent A-file so that they can be reviewed with subsequent visa petitions to prevent petitioners for permanent resident status from concealing an element of ineligibility or materially changing their claims.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.